"The Charter of The City of New York Should Be Revised in Certain Fundamental and Basic Respects Hereinafter Mentioned.

"The Joint Legislative Committee was constituted to investigate the affairs of the government of the City of New York. It was not designed to be a charter revision committee. As the work of the Committee progressed, it became apparent, however, that the defects in the government of the City of New York were not exclusively personal to its officials, but that the difficulty lay deeper. It became apparent that the very form and structure of the city government was in a large measure responsible for the opportunities for graft and corruption which were disclosed before the Committee."

The drafters of the City Charter, in the light of these recommendations, prepared Chapter 40, including § 903, which regulates the rights and corresponding obligations of the city's employees. The spectacle of City officers and employees resting on their constitutional right against self-incrimination and refusing to testify in the so-called Seabury investigation into alleged corruption in the City administration, highlighted the issue as to whether such officers or employees should retain their public employment. The disclosures of then existing corruption in the city government brought about a realization on the part of proponents of Charter reform and the general citizenry that public servants should not be permitted to remain on taxpayer-supported payrolls if they refused to testify fully before duly empowered investigating agencies, or refused to waive immunity from prosecution when testifying.

The state legislature believed that the loyalty owed by an employee to the state required full cooperation by such employee before any duly constituted governmental body

conducting an inquiry relating to the property, government or affairs of the City of New York, or the official conduct of its employees. Accordingly, the legislature enacted § 903 and established as a condition of continued employment the full cooperation of the employee in such an inquiry. The refusal on the basis of self-incrimination to discharge this duty operates as a self-executing severance from city service.

3. New York State Court of Appeals sanction of Charter § 903.

In *Matter of Daniman, et al.* v. *Board of Education,* 306 N. Y. 532 (1954), Jurisdictional Statement filed with this Court September 28, 1954, certain teachers in the employ of the Board of Education and the Board of Higher Education of the City of New York refused on the basis of self-incrimination to answer inquiries by the Internal Security Sub-Committee of the United States Senate Committee on the Judiciary as to Communist Party membership. The Boards of Education and of Higher Education, respectively, found that these teachers had vacated their positions by operation of § 903 of the New York City Charter.

One of the teachers employed by the Board of Higher Education, Harry Slochower, was represented by separate counsel. He alone urged in the state courts the unconstitutionality of Charter § 903 as violative of the Fourteenth Amendment. On October 5, 1954 he filed a notice of appeal to this Court.

The Court of Appeals of the State of New York, by a vote of four to three, found that the teachers had separated themselves from public service. In neither the opinion of the Court nor the dissent was any doubt expressed as to the fact that these teachers had enjoyed due process.

The dissent stemmed from the question of whether or not the State Legislature intended to have this section apply to New York City teachers or to a Congressional investigating body.

Speaking for the Court, Judge Conway said (p. 538):

> "Section 903 is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The effect of the answer on the teacher's fitness to continue teaching is for the board of education or of higher education, and those bodies only, to say. Section 903 becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him or her. The teacher alone possesses the power to bring the statute into play. The assertion of the privilege against self incrimination is equivalent to a resignation (*Matter of Koral* v. *Board of Educ. of City of N. Y.*, 197 Misc. 221).

Judge Conway reaffirmed the well-established principle that, where a reasonable basis exists a public employee may, as a condition of employment, be required to forego some of the constitutional privileges enjoyed by workers in private industry. He cited (at pp. 538-539) the opinion of this Court in *Adler* v. *Board of Education*, 342 U. S. 485, 492:

> "It is equally clear that they [teachers] have no right to work for the state in the school system on their own terms. [Case cited.] They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

The Court of Appeals was unanimous in its agreement that a query into past or present Communist Party mem-

bership is relevant to an inquiry into a teacher's official conduct (pp. 540-541).

4. This Court has sustained the right of the State to protect itself by promulgating reasonable conditions of employment.

This requirement that a public employee answer pertinent questions in a proper investigation is in essence the same as the ordinance of the City of Los Angeles whereby public employees were required to foreswear that they did not advocate the unlawful overthrow of the government by force and violence and that they were not members of an organization which to their knowledge advocated the unlawful overthrow of the government by force and violence. Any employee who would not take such an oath was thereby precluded from further public employment. The Los Angeles ordinance is obviously designed to assure to the state loyal employees. Similarly, § 903 of the New York City Charter is calculated to protect the city against dishonest or disloyal employees. The constitutionality of the Los Angeles ordinance was passed on by this Court in *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951). This Court said (p. 720):

> "The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 102-103 (1947), and a State is not without power to do as much."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 54

MICHAEL J. REGAN,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF, *AMICUS CURIAE*, BY THE CITY OF NEW YORK

December 2, 1954.

ADRIAN P. BURKE,
Corporation Counsel of the City of New York.

LEO A. LARKIN,
SEYMOUR B. QUEL,
DANIEL T. SCANNELL,
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In disposing of the argument against the constitutionality of the Los Angeles ordinance on the claim that it was a Bill of Attainder, this Court further held (p.):

> "*Cummings* v. *Missouri*, 4 Wall. 277 (1867), and *Ex parte Garland*, 4 Wall. 333 (1867), the leading cases in this Court applying the federal constitutional prohibitions against bills of attainder, recognized that the guarantees against such legislation have never been intended to preclude legislative definition of standards of qualification for public or professional employment. Carefully distinguishing an instance of legislative 'infliction of punishment' from the exercise of 'the power of Congress to prescribe qualifications,' the Court said in *Garland's* case: 'The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.' 4 Wall. at 379-380."

The Court distinguished the Los Angeles ordinance from the Congressional act found unconstitutional by this Court in *United States* v. *Lovett*, 328 U. S. 303, 316:

> "Unlike the provisions of the [Los Angeles] Charter and ordinance under which petitioners were removed, the statute in the *Lovett* case did not declare general and prospectively operative standards of qualification and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees. Under these circumstances, viewed against the legislative background, the statute was held to have imposed penalties without judicial trial."

From an examination of § 903 of the New York City Charter it is manifest that this section is not aimed at any specific individuals as in the *Lovett* case or a well-

defined class of individuals as in *Cummings* v. *Missouri*, 4 Wall. 277 (1866).

Prohibitions on the individual liberties of Federal employees, as distinguished from private citizens, were upheld by this Court in *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1945). This Court held constitutional the "Hatch Act" prohibiting Federal workers from engaging in partisan political activities. Mr. Justice Reed, writing the majorty opinion for this Court, said (pp. 102-103):

> "We have said that Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

This same principle found its first and often quoted enunciation in the words of Mr. Justice Holmes in *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220:

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> "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

The petitioner has argued (Brief, pp. 10-11) that the principle enunciated in the *McAuliffe* case, *supra*, that a public employee such as a policeman may be asked as a condition of employment to forego certain constitutional rights which are enjoyed by private citizens, has been overruled by this Court in *Garner* v. *Los Angeles*, 341 U. S. 716 (1951) and *Wieman* v. *Updegraff*, 344 U. S. 183 (1952). The *Garner* case, which we have discussed *supra*, clearly provides no support for the petitioner's contention but, on the contrary, gives clear recognition to the principle that the state may take reasonable steps to insure the loyalty of its employees.

It is true that in *Wieman* v. *Updegraff*, *supra*, this Court declared an Oklahoma statute as violative of due process where the public employee was required, with or without *scienter*, to swear that within five years prior thereto he had not been a member of an organization which had been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization. The extension by this Court of protection to a public servant from a statute which is patently arbitrary or discriminatory does not provide a basis for the contention that a state may not require a public employee to forego the

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privilege of hiding his dishonesty or disloyalty behind the constitutional privilege of self incrimination.

The same principle of legislative control and establishment of reasonable qualifications has been applied to professions so coupled with the public interest as to require licensing by the state. This Court had upheld the fixing of certain requirements for the continued practice of such professions as medicine in *Dent* v. *West Virginia*, 129 U. S. 114 (1889), wherein the standards for practice were elevated, and in *Hawker* v. *New York*, 170 U. S. 189 (1898), wherein a statute prohibited the practice of medicine by any person convicted of a felony. See also *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954).

When the New York State Legislature enacted New York City Charter § 903 it not only provided that a public employee who refused to cooperate, on the basis of self-incrimination, in effect resigned from public service, but also prescribed a sanction against further public employment of such an employee. It is not unreasonable for the state, in the selection of its employees, to bar anyone who has by his assertion of the constitutional privilege against self-incrimination thwarted or attempted to hinder an investigation vital to the protection of the state. Similar provisions are found in the United States Code. See 18 U.S.C. 205, 216, 281, which involves acceptance of bribes by members of Congress; similarly 18 U.S.C. 202, acceptance of bribes by other governmental officials; and 18 U.S.C. 2381, which involves a permanent proscription from any opportunity to serve in the government for anyone convicted of treason.

This act does not impinge on the constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution. The protection against self-incrimination is granted by the Constitution of the State of

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New York (Art I, § 6). The state may, if a sound basis exists, require a public employee to forego the exercise of this right. *Adamson* v. *California*, 332 U. S. 46; *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319.

5. An employee whose services are terminated pursuant to Charter § 903 is not without judicial remedy in New York State.

A public employee who is deemed by his employer to have separated himself from government service by refusing to answer proper questions asked by a duly constituted body, on the basis of self-incrimination, is not without judicial remedy. He may seek a determination from the courts as to whether or not he falls within the purview of § 903 of the New York City Charter. He may contend that he is not a public employee, within the meaning of the statute; that the legislative body is not duly constituted to conduct its inquiry; or that such inquiry does not properly relate to the property, government or affairs of the city, or the official conduct of its employees (New York Civil Practice Act, Article 78 §§ 1283-1306).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 54

MICHAEL J. REGAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF, *AMICUS CURIAE*, BY THE CITY OF NEW YORK

Preliminary Statement

The City of New York, a political subdivision of the State of New York, by its responsible and authorized law officer, the Corporation Counsel, sponsors this brief on behalf of the City of New York. *Rules of the Supreme Court, Rule 42, subd. 4; New York City Charter § 394.* The Corporation Counsel was unaware of this case, a criminal proceeding, until November 17, 1954, the day prior to oral argument before this Court. On oral argument permission was granted to the parties to submit briefs on the constitutionality of § 903 of the New York City Charter. The Corporation Counsel submits this brief *amicus curiae* on this issue.

CONCLUSION

The obligations imposed on public employees pursuant to Charter § 903 are not arbitrary or unreasonable conditions of employment. The order appealed from should be affirmed and this appeal dismissed.

New York, December 2, 1954.

Respectfully submitted,

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The Interest of the *Amicus*

The City of New York employs more than 200,000 persons who serve in the various departments, agencies and subdivisions of the local government, including more than 38,000 public school teachers. The provisions of New York City Charter § 903 which, as a condition of employment, require a public employee to answer any pertinent inquiries of a duly constituted investigating body and precludes a refusal to testify, on the basis of self-incrimination, are applicable to each of these employees. Accordingly, the City of New York is vitally concerned in sustaining the decisions of the New York state courts which have sustained the separation from public employment of public employees who violated this section.

In the instant case the petitioner has challenged the constitutionality of § 903 as being violative of the due process guaranteed him by the Fourteenth Amendment. The constitutionality of this section is of vital importance to the protection of the community from the dishonest or disloyal public employee.

The Statute Involved

New York City Charter, § 903 provides as follows:

> "**Failure to testify.** If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate

APPENDIX A

New York City Charter, Laws of 1934, Chapter 867, Adopted by Referendum on November 3, 1936, Effective January 1, 1938.

§ 887. Corrupt Practices.—No councilman or other officer or employee of the city shall give or promise to give any portion of his compensation or any money or valuable thing to any person, in consideration of his having been or being nominated, appointed, elected or employed as such officer or employee, under the penalty of forfeiting his office or employment and being forever disqualified from being elected, appointed or employed in the service of the city, and shall on conviction be punished for a misdemeanor.

§ 888. Political Contributions.—No councilman or other officer or employee of the city shall, directly or indirectly, pay or promise to pay any political assessment, subscription or contribution under the penalty of forfeiting his office or employment. Any violation of this section shall be a misdemeanor.

§ 895. Officer Not to Hold Any Other Civil Office.—Any person holding office, whether by election or appointment, who shall, during his term of office, accept, hold or retain any other civil office of honor, trust or emolument under the government of the United States, except commissioners for the taking of bail, or of the state, except the office of notary public or commissioner of deeds or officer of the national guard, or who shall hold or accept any other office connected with the government of the city, or who shall accept a seat in the legislature, shall be deemed thereby to have vacated any office held by him under the city government; except that the mayor may

him or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

The Question Presented

May the State, cognizant of the benefits, tenure and stability of public employment, and endeavoring to secure the full cooperation of its personnel on matters affecting the State, establish as a qualification of employment the requirement that employees forego the plea of self-incrimination as a basis for refusal to testify before duly constituted government bodies?

SUMMARY OF ARGUMENT

The State, which has assured public employees selection on the basis of merit as well as tenure in their positions, may create conditions of employment calculated to assure honesty and loyalty in its employees.

1. **Public employment in New York State confers advantages with concurrent obligations which distinguish it from private employment.**
2. **Historical background of Charter § 903.**
3. **New York State Court of Appeals sanction of Charter § 903.**
4. **This Court has sustained the right of the state to protect itself by promulgating reasonable conditions of employment.**
5. **An employee whose services are terminated pu suant to Charter § 903 is not without judicial remedy in New York State.**

accept, or may in writing authorize any other person holding office to accept, a specified civil office, in respect to which no salary or other compensation is provided. No person shall hold two city or county offices, except as expressly provided in this charter or by statute; nor shall any officer under the city government hold or retain an office under a county government, except when he holds such office ex officio by virtue of an act of the legislature, and in such case shall draw no salary for such ex officio office.

§ 896. Fraud of Officer.—Any councilman or other officer or employee of the city who shall wilfully violate or evade any provision of law relating to his office or employment, or commit any fraud upon the city, or convert any of the public property to his own use, or knowingly permit any other person so to convert it or by gross or culpable neglect of duty allow the same to be lost to the city, shall be deemed guilty of a misdemeanor and in addition to the penalties imposed by law and on conviction shall forfeit his office or employment, and be excluded forever after from receiving or holding any office or employment under the city government.

§ 901. Punishment for False Returns and Deceptive Reports.—Any officer or employee of the city who shall knowingly make a false or deceptive report or statement in the course of his duty or shall, except as in this charter otherwise provided, receive compensation except from the city for performing any official duty, or shall accept or receive any gratuity from any person whose interests may be affected by his official action, shall be guilty of a misdemeanor and if convicted shall forfeit his office or employment.